TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 19[illegible]

No. 585

JOHN COLEMAN, PETITIONER

vs.

ALABAMA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

[illegible]

PETITION FOR CERTIORARI FILED SEPTEMBER 21, 19[illegible]

CERTIORARI GRANTED OCTOBER 14, 19[illegible]

Supreme Court of the United States

OCTOBER TERM, 1963

No. 583

JOHN COLEMAN, PETITIONER

vs.

ALABAMA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

INDEX

	Original	Print
Record from the Circuit Court of Greene County, Alabama	1	1
Arraignment	1	1
Organization of Court	3	3
Indictment	3	3
Jury verdict	6	4
Letter re appointment of counsel	7	5
Affidavit of indigency	8	6
Order of Court appointing counsel to prosecute appeal of indigent defendant	10	7
Motion for new trial	15	9

	Original	Print
Record from the Circuit Court of Greene County, Alabama—Continued		
Amendment to motion for new trial	18	12
Defendant's Exhibit "A" — Affidavit of Mrs. Alice Axles	19	13
Denial of motion for new trial	21	14
Hearing on motion for new trial	22	15
Appearances	22	15
Colloquy between Court and counsel	22	15
Testimony of Thomas H. Boggs	26	20
Denial of motion for new trial	29	23
Jury verdict	30	24
Judgment entry	30	24
Proceedings in the Supreme Court of Alabama	33	27
Argument and submission of cause	33	27
Opinion, Simpson, J.	34	28
Judgment	45	35
Application for rehearing	47	36
Order overruling application for rehearing	48	37
Order granting motion for leave to proceed in forma pauperis and petition for certiorari	49	38

[fol. 1]

IN THE CIRCUIT COURT OF GREENE COUNTY ALABAMA

STATE OF ALABAMA

vs 823 A

JOHNNY COLEMAN, ALIAS

ARRAIGNMENT—March 22, 1962

The defendant being present and examined in open Court, the Court finds that the defendant is not represented by counsel employed by him and that he is unable to employ counsel; and the Court hereby appoints Hon. Thos. F. Seale, a practicing attorney in this Court to represent and defend the defendant on his trial in this case, hereby confirming his original appointment made on Jan. 22, 1962.

On this the 22nd day of March, 1962, the defendant Johnny Coleman, alias, in the above entitled cause, being present and attended by and with his counsel in open Court, is duly and legally arraigned upon the indictment charging him with Murder 1st Degree and on being arraigned for his plea thereto says that he is not guilty. It is now considered, ordered and adjudged by the Court that this case be, and the same is hereby set for trial in this Court on the 3rd day of April, 1962, that being Tuesday of the second week of this term of Court; and it is hereby ordered by the Court that 51 jurors (including those drawn on the regular juries for the week set for the trial of this case) be allowed for the trial of this case; and the Court finds and adjudges that 54 persons have been drawn on the regular juries for said week of this Court.

It is therefore ordered by the Court that the names of 1 Special Juror be now drawn from the jury box as required by law, which, together with the regular jurors

drawn for the week set for the trial of this case, shall constitute the venire for the trial of this case.

Whereupon the Court, by the Judge presiding, did in open Court and in the presence of the said defendant and his attorney, draw from the jury box 1 name, which, with the regular jurors drawn for the week set for the trial in this case, make the number named in this order; and the Court hereby orders that the Sheriff of this County, be and is hereby commanded to summon all of said jurors constituting said venire to appear in this Court on Tuesday, the 3rd day of April, 1962, to serve as jurors for [fol. 2] the trial of this case; and that the said Sheriff forthwith serve on said defendant a list of names of all jurors drawn for the week in which the trail of this case is set and those drawn in this case as aforesaid in open Court from the jury box, together with a copy of the indictment in this case as required by law.

E. F. HILDRETH
Judge Presiding

[fol. 3]

IN CIRCUIT COURT OF GREENE COUNTY

ORGANIZATION OF COURT

[Title Omitted]

At a regular, adjourned or special term of the Circuit Court of Greene County, Alabama, at Law, at which the officers authorized and required by law to hold or serve such court were serving, the following proceedings were had in the cause styled;

IN CIRCUIT COURT OF GREENE COUNTY

INDICTMENT

[Title Omitted]

The Grand Jury of said County charge that before the finding of this indictment John Coleman, alias Johnny Coleman, alias Big Time Coleman whose name is otherwise unknown to the Grand Jury, unlawfully and with malice aforethought, killed John D. Johnson, who was also known as Screwdriver Johnson, by shooting him with a gun or pistol, against the peace and dignity of the State of Alabama.

/s/ T. H. BOGGS,
Solicitor of the 17th Judicial Circuit

Endorsed on back "A true Bill."

/s/ JOE L. SANDERS
Foreman Grand Jury

Presented to the presiding Judge in open Court by the Foreman of the Grand Jury, in the presence of 17 other Grand Jurors, and filed in open court in the pres-

ence of the Grand Jury by order of Court this 22nd day of March, 1962.

MARY C. YARBROUGH
Clerk

Bail fixed at NO BAIL this 22 day of March, 1962.

E. F. HILDRETH
Judge Presiding

Witnesses:

Shelley Cook	Ralph Johnson
Dr. Frederick	Emmett Polk
Mathew Rivers	Luther Mattison
Robert Rivers	Morris Constantine
Harry Abrams, Jr.	Paul Stokes
Elmer Crosley	Nelson Grubbs
Harvey Hill	J. O. Banks
C. Rhodes	W. E. Lee
J. D. Johnson, Jr.	Mrs. Emery Sternwhite
Jas. Duncan	Mattie Pearl Duncan
Jim "Lee" Johnson	Dunk Austin, Jr.
Ervin Scales	Joe Schoekley
Melvin Durrett	Arthur Chambers
Sam Parker	Mrs. Porter
	Mrs. Franklin (Banks & Co.)

[fols. 4-5] * * *

[fol. 6]

IN CIRCUIT COURT OF GREENE COUNTY

JURY VERDICT

We, the Jury, find the defendant guilty of murder in the first degree, as charged in the indictment, and fix his punishment at death by electrocution.

J. E. TRIMBLE
Foreman

[fol. 7]

IN CIRCUIT COURT OF GREENE COUNTY

LETTER RE APPOINTMENT OF COUNSEL—Filed April 6, 1962

Judge E. F. Hildreth
Judge of the Circuit Court
of Greene County, Alabama
Eutaw, Alabama

Re: John Coleman
Case # 823-A

Dear Judge Hildreth:

We have received your request that we verify the statement of said defendant, John Coleman, that he is without sufficient funds and has no reasonable way of producing the same to pay certain court costs.

We have talked with the defendant's lawyer, Lawyer Thomas Seale, and with Deputy Sheriff Cecil Rhodes who stated that John Coleman is without funds to meet the above court costs. According to Lawyer Seale, John Coleman has no relatives who are financially able to defray these expenses.

Based upon our knowledge of the facts and our findings upon investigation of the facts in this matter it is our opinion that the defendant, John Coleman, does not have the financial means to defray the expenses of his appeal.

Sincerely yours,

EMORY S. STERN
MRS. MAX STERN
Counsellor

Approved:

LUCY K. LOCKLIN, Director

[fol. 8]

* * * * *

IN CIRCUIT COURT OF GREENE COUNTY

* * * * *

AFFIDAVIT OF INDIGENCY

Personally appeared before me, the undersigned authority in and for Greene County, Alabama, John Coleman, who, being by me first duly sworn, deposes and says:

I am the defendant in the above styled case. I am without sufficient funds to defray the costs of an appeal in this case, or to pay the court reporter the lawful fees for transcribing the testimony and other proceedings, or to employ competent legal counsel to prosecute my appeal. I have no money or property and have no means of getting any, and have no reasonable way of getting assistence from any one else.

JOHN COLEMAN

Sworn to and subscribed before me, this
5th day of April, 1962.

THOMAS F. SEALE
Filed April 5, 1962.

MARY C. YARBROUGH,
Clerk

[fol. 9] * * *

[fol. 10]

IN THE CIRCUIT COURT OF GREENE COUNTY, ALABAMA

* * * *

ORDER OF COURT APPOINTING COUNSEL TO PROSECUTE APPEAL OF INDIGENT DEFENDANT—April 9, 1962

The defendant in this case, having been convicted on April 4, 1962, in the Circuit Court of Greene County, Alabama, of murder in the first degree and sentenced to death by electrocution, and having made a sworn statement as provided by law that he is without sufficient funds and that he has no reasonable way of procuring the same to pay the Court Reporter her lawful fees for transcribing the testimony and other proceedings had at the trial of said case, and that he is without sufficient funds, and has no reasonable way of procuring the same, to employ competent legal counsel to prosecute his appeal in the Supreme Court of Alabama, and defendant's sworn statement having been filed with the Clerk of the Circuit Court of Greene County, Alabama, as provided by law on the 5th day of April, 1962; and, the Clerk of the Circuit Court of Sumter County, Alabama, having certified to the undersigned as the trial judge a true and correct copy of said sworn statement filed with her, as authorized by law in cases of automatic appeal by the defendant from the judgment of the court imposing a death sentence for the commission of a felony against the peace and dignity of the State of Alabama; and, the under signed, as trial judge, having on to-wit; the 5th day of April, 1962, called upon the Department of Pensions and Security of Greene County, Alabama, in writing, to investigate and report any facts as to the truth or correctness of said statement of the defendant that he is an indigent appellant, as defined by law; and, the Department of Pensions and Security of Greene County, Alabama, having filed its written report dated the 4th day of April, 1962, to the effect that the said defendant, John Coleman, is unable to employ counsel to prosecute his appeal to the Supreme Court of Alabama and that the facts as set forth in de-

fendant's sworn statement that he is without sufficient funds and has no reasonable way of procuring the same to pay the Court Reporter her lawful fees for transcribing the testimony and other proceedings had at the trial of said cause, and that he is without sufficient funds, and has no reasonable way of procuring the same, to employ competent legal counsel to prosecute his said appeal to the Supreme Court, are true and correct;

It is therefore considered by the Court, and the Court ascertains and finds that the said defendant, John Coleman, is an indigent appellant within the meaning and as provided by law, and that he is without sufficient funds and has no reasonable way of procuring the same, to pay the Court Reporter her lawful fees for transcribing the testimony and other proceedings had at the trial of said cause, and that he is without sufficient funds, and has no reasonable way of procuring the same to employ competent legal counsel to prosecute his appeal to the Supreme Court; and, the Court hereby appoints Honorable Thomas F. Seale, who is a competent, practicing attorney at the bar of Greene County, Alabama, as counsel to represent said Defendant and to prosecute his appeal to the Supreme Court of Alabama in said cause.

Given under my hand this 9th day of April, 1962.

E. F. HILDRETH
Judge of the Circuit Court of
Greene County, Alabama

[fols. 11-14] * * *

[fol. 15]

IN THE CIRCUIT COURT OF GREENE COUNTY, ALABAMA

[Title Omitted]

MOTION FOR NEW TRIAL—Presented May 4, 1962

Now comes the defendant, in the above entitled cause, by his attorney, and moves the Court to set aside the verdict of the jury and the judgment rendered thereon on to-with, the 4th day of April 1962, and to grant to the defendant a new trial; and as grounds for said Motion, the defendant sets down and assigns, separately and severally, the following:

1. The verdict of the jury is contrary to the evidence in the case.
2. The verdict of the jury is contrary to the law in the case.
3. The verdict of the jury is contrary to the evidence and the law in the case.
4. The verdict of the jury was contrary to the great preponderance of the evidence in the case.
5. The verdict of the jury was contrary to the weight of the evidence in the case.
6. In that the verdict is not sustained by the great preponderance of the evidence in the case.
7. For that the judgment of the Court is not sustained by the great preponderance of the evidence in the case.
8. For that the verdict of the jury is not sustained by the great preponderance of the evidence and is contrary to both the law and the facts in the case.
9. In that the verdict of the jury is based on bias, prejudice and passion against the defendant.
10. For that the verdict of the jury was such as to indicate bias, prejudice or other improper motive.
11. For that the sentence is excessive.
12. For that the verdict and judgment is so grossly excessive, in that there is no competent testimony that should cause the jury to sentence the defendant to such a high degree of punishment.

13. For that there existed a material variance between the inictment and the proof.

14. For that the evidence in this case is not sufficient to justify a legal conviction for the crime of murder in the first degree.

15. For that the evidence in this case fails to prove elements essential to the crime of murder in the first degree.

16. For that the evidence in this cause is not sufficient to prove beyond a reasonable doubt every material ingredient of the offense of murder in the first degree.

17. For that the Court erred in overruling objection by the defendant to the introduction of evidence and exhibits offered on behalf of the State of Alabama in this cause.

18. For the Court erred in overruling objections, by the defendant to the introduction of evidence and exhibits offered on behalf of the State of Alabama which was so biased and prejudiced that the defendant was [fol. 16] denied the right of a fair and impartial trial.

19. The Court erred in overruling the defendant's Motion to exclude the evidence in this cause.

20. For that the Court erred in sustaining objections, by the State of Alabama to evidence the defendant sought to introduce in his behalf in this cause.

21. For that the Court erred in overruling the defendant's several objections throughout the hearing of this cause.

22. For that the Court erred in putting defendant to trial without quashing the jury venire on grounds that Negroes had been systematically excluded therefrom, because of their race or color in violations of rights and privileges guaranteed him by the Fourteenth Amendment to the Constitution of the United States.

23. For that the Court erred in failing to quash the indictment returned against defendant in this cause, in that no Negroes or only a token number thereof, served on the Grand Jury which returned aforesaid indictment against defendant in this cause, and in face of the great preponderance of evidence known to the Court that fes, if

any Negroes, had ever served on a Grand Jury in Greene County, Alabama, in modern times.

24. For that the Court erred in failing to declare void and illegal the petit jury drawn to try defendant in this cause, in that there were no Negroes serving on said Petit Jury.

25. For that the Court erred in failing to quash the Venire and Indictment drawn and returned against the defendant on the grounds that Negroes qualified for jury service in Greene County, Alabama are arbitrarily, systematically and intentionally excluded from jury duty in violation of rights and privileges guaranteed defendant by the Fourteenth Amendment to the United States Constitution.

ORZELL BILLINGSLEY, JR.
Attorney for Defendant

The foregoing Motion being presented this 4th day of May, 1962, is hereby set for hearing before the Honorable Emmett Hildreth, Judge, on the 1st day of June, 1962, at 10:00 o'clock a. m.

E. F. HILDRETH
Judge

[fol. 18]

IN CIRCUIT COURT OF GREENE COUNTY

AMENDMENT TO MOTION FOR NEW TRIAL—Presented June 1, 1962

Now comes the defendant *comes the defendant* in the above entitled cause, by his attorney and with leave of the Court first had and obtained and amends his original Motion for New Trial, and adds additional paragraphs as follows:

26. For that the Court erred in conducting defendant's trial in the segregated system of justice in Greene County, Alabama, including the Court House in which the defendant was tried and convicted in violation of the Fourteenth Amendment to the United States Constitution.

27. For that the defendant should be granted a new trial because of newly discovered evidence, as shown by the affidavit of Mrs. Alice Axle attached hereto and marked defendant's Exhibit "A".

WHEREFORE, the defendant prays that this Court will take notice of his Motion For New Trial in the above said cause, and set said Motion down for hearing, and that your Honor will, after consideration of the evidence and proof which the defendant offers to make, grant said Motion.

ORZELL BILLINGSLEY, JR.
Attorney for Defendant

The foregoing Motion being presented this first day of June, 1962, is hereby set for hearing before the Honorable Emmett Hildreth, Judge on the first day of June, 1962, at 10:00 o'clock A. M.

.....
Judge

* * * *

[fol. 19]

DEFENDANT'S EXHIBIT "A" TO AMENDMENT

STATE OF ALABAMA
JEFFERSON COUNTY

Personally appeared before me the undersigned authority in and for said County, in said State, the above named Mrs. Alice Axle, who being by me first duly sworn on oath deposed and says that the facts alleged below are true and correct to the best of her information, knowledge and belief.

Affiant states that she is the mother of one Johnnie Coleman, who was tried and convicted for murder in the first degree in a racially segregated Courthouse of Greene County, Alabama, and was sentenced to death by electrocution on April 4th, 1962. She states that her aforesaid son was indicted by a Grand Jury in said County composed of eighteen (18) white men, and was tried and convicted by a jury composed of twelve men (white).

Affiant further states that she was informed after the trial and conviction of her aforesaid son of a practice by the Jury Commissioners of Greene County, Alabama of intentionally and systematically excluding qualified negroes from Jury duty in aforesaid County, by not including their names on the jury roll, or if included on said roll, their names are left out of the jury box or if put in the jury box and drawn, they are not listed for service and because of the aforesaid practices, no negroes, or only a mere token have been summons for jury duty in Greene County, Alabama, in spite of the population ratio of the two races, in modern times.

MRS. ALICE AXLES
Affiant

Sworn to and subscribed before me this 31st day of May, 1962.

JACQUELINE J. WALLACE
Notary Public

[fol. 20]

IN CIRCUIT COURT OF GREENE COUNTY

MOTION TO STRIKE AMENDMENT—Filed June 1, 1962

Comes now the State of Alabama, by the Solicitor of the Seventeenth Judicial Circuit of Alabama, and moves the Court to strike the amendment to the motion for a new trial filed this day in the above stated cause, and to each and every ground thereof, separately and severally; and for grounds of this motion to strike, assigns the following, separately and severally:

1. That more than thirty days has elapsed since the trial of this cause and the time in which this Defendant was sentenced by the Court and the same is not germane to any legal ground in the original motion for a new trial;
2. That said amendment raises questions which are illegal under law to be raised for the first time by a motion for a new trial.

T. H. BOGGS, as
Solicitor of the 17th Judicial
Circuit of Alabama

* * * *

[fol. 21]

IN CIRCUIT COURT OF GREENE COUNTY

DENIAL OF MOTION FOR NEW TRIAL—June 1, 1962

6-1-62 . . . Defendant files amendment to his motion for new trial; and the Solicitor for the State of Alabama files motion to strike the amendment; and the Court grants the Solicitor's motion to strike the amendment.

The Motion of Defendant to set aside the verdict and grant a New Trial is overruled and denied.

E. F. HILDRETH, Judge

[fol. 22]

IN THE CIRCUIT COURT OF GREENE COUNTY, ALABAMA

* * * *

[Title Omitted]

HEARING ON MOTION FOR NEW TRIAL—June 1, 1962

This cause came on to be heard in the Circuit Court of Greene County, Alabama, on June 1, 1962, on motion for new trial filed by Defendant, before Honorable Emmett F. Hildreth, presiding Judge of said Court, and the following is a transcript of the testimony and proceedings had at the hearing of said motion:

APPEARANCES:

ON BEHALF OF THE STATE:

Honorable Thos. H. Boggs, Solicitor,
Honorable Ralph R. Banks, Deputy Solicitor.

ON BEHALF OF DEFENDANT:

Honorable Orzell Billingsley, Jr.,
Birmingham, Alabama.

(Upon the calling of this cause by the Court for hearing, the Solicitor made the following statement:)

COLLOQUY BETWEEN COURT AND COUNSEL

SOLICITOR: The Defendant has filed an amendment to his motion for new trial, and, may it please the Court, at this time the State wishes to file a motion to strike, and I would like to dictate it to the Court Reporter.

COURT: All right.

SOLICITOR: This amendment to the motion which has been filed this morning by the attorney for the Defendant, which says in substance, "Grounds 26. For that the Court erred in conducting defendant's trial in the segregated system of justice in Greene County, Alabama,

including the courthouse where the defendant was tried and convicted in violation of the Fourteenth Amendment to the United States Constitution. Ground 27. For that the defendant should be granted a new trial because of newly discovered evidence, as shown by the affidavit of Mrs. Alice Axle attached hereto and marked defendant's Exhibit A." If the Court please, if you will review the original motion for a new trial, we don't think that either one of these—I don't think there is anything in there about any newly discovered evidence. I don't recall that there is. You might look through it. I don't recall anything in the original motion about any newly discovered evidence, and this amendment, which was just filed this morning, in our opinion, is too late, because, if a matter is to be raised by motion for new trial, it must be filed within thirty days, and no amendment made thereto unless it is germane to the original motion. "For that the Court erred in conducting the defendant's trial in a segregated system of justice in Greene County;" [fol. 23] we think that that ground should be struck also, because that particular point was not raised in the original motion. I would like for the State to file a motion to strike this amendment to motion for a new trial, and as grounds for the motion, assign separately and severally: Ground 1. That the grounds 26 and 27 or either of them are not germane to any legal ground in the original motion and more than thirty days has elapsed since the trial in this case. Ground 2. It raises questions which are illegal for the first time to have been raised on a motion for a new trial. That is our first motion.

COURT: Would you like to be heard?

ATTORNEY FOR DEFENDANT: Yes sir. If your Honor please, I would like to state that ground number 27 and number 28 as to the segregated system in the courthouse here alleges properly that such would be in violation of the Fourteenth Amendment to the Constitution of the United States. I realize that any matter must always be properly raised at a proper time. However, it generally is never too late to raise the violation of the Fourteenth Amendment to the Constitution, especially in a capital case. However, I might state to the Court that

I was recently authorized to represent the defendant in this case, and I anticipated my amendment would include more points than it did. However, I did not—the Supreme Court of Alabama will review this case on appeal. Irregardless of what his lawyer, his counsel, might do, it will examine the record to see whether there was any violation on the part of the Court in the conviction of this defendant. As for 27, on newly discovered evidence, I have an affidavit attached to my amendment, and I raise that it has to do with the jury system in this county, and it was raised in my original motion for a new trial, and I think I should be heard in behalf of the defendant on my amendment.

COURT: I am listening to you right now.

ATTORNEY FOR THE DEFENDANT: That's all.

COURT: Do you have any authority to cite in support of your motion?

ATTORNEY FOR DEFENDANT: I would like to be given an opportunity to give the Court a brief on it.

COURT: I would be glad to have your brief on it, but I don't know of any authority which would authorize you to file the amendment.

ATTORNEY FOR DEFENDANT: I think the Fourteenth Amendment to the United States Constitution does.

[fol. 24] COURT: There is no evidence before this Court that there has been any violation of any of the rights of this defendant. In fact, I think the contrary is true.

ATTORNEY FOR DEFENDANT: Your Honor, if you want to, I'll just take an exception to your ruling as it relates to the amendment.

COURT: The motion of the Solicitor to strike the dedendant's amendment to his motion for new trial is granted.

ATTORNEY FOR DEFENDANT: And we want an exception. Your Honor, I would like to call my witnesses.

COURT: All right.

ATTORNEY FOR DEFENDANT: I want to use Mr. Banks and Mr. Boggs first, because they were in the trial of this cause. Mr. Boggs, will you take the stand, please sir?

SOLICITOR: Just one moment. This may save a little time, may it please the Court. There are different modes and different manners of attacking things. On a motion for a new trial, of course, one of the very latest authorities on that, which will back up what I said a while ago, is Latham vs State, 77 Southern Second 499, and also in here we see a number of points raised for the first time on motion for a new trial. Now in this case, I am going to make this statement, because I think it will save time in taking of evidence and everything else in this matter, may it please the Court, if the Court will bear with me. Mr. Tom Seale, a very capable attorney, who has been practicing law about 25 years or more and also, a few years back, was County Solicitor of Sumter County for a number of years, was appointed by the Court and notified about two months prior to this trial that he would be appointed formally by the Court to represent and defend this defendant in this case and to be in conference with his client, which I understand that he was. In order that every right would be guaranteed this person before the trial, no special term of court was called; the arrest was made in this matter about August of 1961; the trial was not held until April of '62. Mr. Seale very ably represented him on this trial, on his arraignment; and in matters that the defense counsel is raising here now about the Fourteenth Amendment, the Supreme Court of Alabama has repeatedly held that they can not be raised for the first time on motion for a new trial. Now I cite as authority one of the more recent cases, 42 Southern Second 626, which also cites the Fourteenth Amendment to the Constitution of the United States.

COURT: Do you have the quotation from that?

SOLICITOR: Yes sir. This case was carried to the Supreme Court of the United States, and the Supreme Court of the United States concurred in it, and this is what it held: "Where no question was raised by a negro [fol. 25] defendant on or before his trial for murder of a white man as to formation of the grand jury presenting the indictment, objections to the grand jury and petit jury, based on exclusion of negroes, could not be raised

for the first time on a motion for a new trial after a verdict of guilty." The citation of the United States Supreme Court is 399 United States 929, 94 Lawyers Edition 1350. It is followed in 92 Southern 245, or 18 Alabama Appeals 352, and it is indirectly followed again by the Supreme Court of the United States in 1961 in 82 Supreme Court 157, and these matters that are raised there we consider illegal. No motion for a change of venue was made and no motion to quash the venire was made, and the Court will take judicial knowledge of it. We don't think any evidence along that line would be legal, and we would object to any evidence, because it would just be a waste of time, because the Supreme Court of Alabama and the Supreme Court of the United States have held that it is illegal.

COURT: I do not know what the petitioner expects to present.

ATTORNEY FOR DEFENDANT: I would like to make an offer of what I intend to show.

COURT: The Court will be glad to hear from you on the law if you care to discuss it.

ATTORNEY FOR DEFENDANT: Your Honor, I would like to offer to show that the whole purpose. . . . .

COURT: I don't want any argument about what you want to offer. I want an argument on the law.

ATTORNEY FOR DEFENDANT: I agree with Mr. Boggs as to those cases to some extent. However, I still believe that is discretionary with the Court as to whether or not the Court will allow me to proceed on my motion for new trial.

COURT: The Court is allowing you to proceed on your motion for new trial.

ATTORNEY FOR DEFENDANT: As it relates to the jury system.

COURT: You may proceed under the rules and statutory provisions relating to it. The Court will permit that. I don't know what you expect to show. If you wish, Mr. Boggs and Mr. Banks may be sworn and placed upon the stand, and you may propound the questions to them if you care to do so; and if an objection is raised, then the Court will rule upon it. However, I thought

as a preliminary matter, the Court would hear from you as to your construction of the law and of the rules and [fol. 26] statutory provisions.

ATTORNEY FOR DEFENDANT: I will have to agree that the cases say what Mr. Boggs said. However, it is our contention that the Court has some discretion in the matter.

COURT: The Court is bound by the statutory provisions and rules which apply to motions for new trial, and of course it is the duty of the Court to construe those provisions. That is what the Court wants to do. If you concur with Mr. Boggs, as you say you do, then of course we can get along without any argument.

ATTORNEY FOR DEFENDANT: Well, I don't want to take up the Court's time. I might as well indicate to the Court the purpose for which I am calling Mr. Boggs to the stand as a witness.

COURT: If you want to place Mr. Boggs on the stand, the Court will permit you to do so.

MR. THOMAS H. BOGGS, being called as a witness, and being first duly sworn, testified as follows upon direct examination by the attorney for the defendant:

Q. Will you state your name to the Court, please?

A. Thomas H. Boggs.

Q. And where do you live, Mr. Boggs?

A. Linden, Marengo County, Alabama.

Q. I see. And how long have you lived in Marengo County, Alabama?

A. Since 1935.

Q. And what is your profession?

A. I am a lawyer.

Q. I see. And how long have you been engaged in the practice of law?

A. Since 1934.

Q. Since 1934; you are presently the Solicitor of what county—I mean what circuit?

A. Of the 17th Judicial Circuit of Alabama, which is composed of Marengo, Greene and Sumter Counties, in Alabama.

Q. And how long have you been Circuit Solicitor of the 17th Judicial Circuit?

A. I don't recall just exactly, but somewhere in the neighborhood of seventeen years, exclusive of some service in the armed forces.

Q. Did you at any time serve as County Solicitor before you became Circuit Solicitor?

A. I never did.

[fol. 27] Q. And prior to that time, you were engaged in the general practice of law?

A. That is correct.

Q. Did your practice take you in all the counties within the 17th Judicial Circuit?

A. Yes.

Q. And since, for the last seventeen years you have had opportunity to try criminal cases in Greene County, Alabama, have you not?

A. Very frequently.

Q. And you were usually present when the grand juries were convened in this county?

A. I've been in every grand jury since I have been Solicitor.

Q. You have? I'll ask you. . . . . .

A. I haven't missed a one in any one of the Circuit, any one of the counties.

Q. I see. You've always been present when the grand jury in this county was convened?

A. I have, in Greene County.

Q. Do you have a wide acquaintance among whites and negroes in this county?

A. I do.

Q. You do have a wide acquaintance among both negroes and whites in this county?

A. Yes.

Q. Are you acquainted with the population ratio of negroes and whites in this county?

A. I don't know the ratio just exactly. I think the ration of negroes is much higher than it is whites, but what the ratio is, I don't recall.

Q. Well, in your best judgment, do you think it would be four to one?

SOLICITOR: Now, may it please the Court, we are getting into the field that we have objected to, and we

would object to this as bringing in matters which should not be brought by a motion for new trial, and this is an improper mode of raising that question, and I object to it.

ATTORNEY FOR DEFENDANT: These are just preliminary questions, and I am leading up to my point.

COURT: The Court has no objection to your putting Mr. Boggs on the stand. The Court has no objection to your asking Mr. Boggs any question in relation to the trial of this case, the procedure of this case or anything of that kind, as to whether or not the law was complied [fol. 28] with and so on. The Court has no objection to that.

ATTORNEY FOR DEFENDANT: I can ask whether or not the law was complied with?

COURT: Yes. The fact that the law was complied with, that is a general question, but the Court will sustain an objection to that because the courts have held repeatedly, the Supreme Court of Alabama and the Supreme Court of the United States, that you can not go into those matters unless they have been raised properly during the trial or in some proceedings prior thereto. That is the reason I asked you the question before. The case was tried by Mr. Boggs and the Court is familiar with it.

ATTORNEY FOR DEFENDANT: But I would like to get one or two of these questions in the record for the purpose of taking an exception to it.

COURT: You may ask the questions, but the Court will have to sustain an objection to them.

Q. Mr. Boggs, you were present when the Grand Jury, which indicted Johnny Coleman, was convened, were you not?

A. I was.

Q. How many persons were on that grand jury?

A. Eighteen.

Q. Were any negroes on that grand jury?

SOLICITOR: I object to that, may it please the Court. It is an illegal mode of raising that which should have been raised by motion to quash the indictment.

COURT: Sustain the objection.

ATTORNEY FOR DEFENDANT: I want to ask one more question, and then I won't have any further question to ask—two more, your Honor.

Q. Were there any negroes on the petit jury that tried this defendant?

SOLICITOR: I object to that, may it please the Court, on the ground that it should have been properly raised by motion to quash the venire if the Fourteenth Amendment was to be taken advantage of in this matter.

COURT: Sustain the objection.

ATTORNEY FOR DEFENDANT: Your Honor, we have no further questions, and we have no further argument either. We would like to just submit—I wanted to get that in the record—we would like to submit the [fol. 29] motion to the Court.

DENIAL OF MOTION FOR NEW TRIAL

COURT: The motion is overruled and denied.

ATTORNEY FOR DEFENDANT: We take an exception to it.

(This was all the evidence submitted.)

[fol. 30]

IN CIRCUIT COURT OF GREENE COUNTY

JURY VERDICT

We, the Jury, find the defendant guilty of murder in the first degree, as charged in the indictment, and fix his punishment at death by electrocution.

J. E. TRIMBLE
Foreman

IN CIRCUIT COURT OF GREENE COUNTY

JUDGEMENT ENTRY—April 4th, 1962

[Title Omitted]

This day in open Court came the State of Alabama by its Solicitor and the defendant in his own proper person and with his attorney, and the defendant having therefore on the 22nd day of March, 1962, been arraigned on the indictment in this case charging him with the offense of Murder 1st Degree, and on said arraignment the State of Alabama by its Solicitor Hon, T. H. Boggs, who prosecutes for the State, the defendant in his own proper person and his attorney, Hon. Thos. F. Seale were all then and there present, to which indictment on said arraignment the defendant plead not guilty, and the trial of this case having been regularly set for this day, thereupon in open Court on this day in the presence of the State Solicitor, defendant's attorney and defendant the Court proceeded to empanel the jury to try this case from the special venire drawn for the trial of this case. Thereupon in open Court on this day in the presence of the State Solicitor, defendant's attorney and defendant, each of whom were all present throughout the trial of this cause, came a jury of good and lawful men, to-wit: J. E. Trimnle and eleven others, who, having been duly empaneled and sworn according to law, who, having heard the

evidence and the charge of the Court, upon their oaths in open Court on this day in the presence of the State Solicitor, defendant's attorney and defendant do say "We the jury find the defendant guilty of murder in the first degree as charged in the indictment, and fix his punishment at death by electrocution."

Thereupon in open Court on this day in the presence of the State Solicitor, defendant's attorney, the defendant, John Coleman, alias Johnny Coleman, alias Big Time Coleman being asked by the Court if he had anything [fol. 31] to say why the judgment and sentence of the law should not be passed upon him replied "he had not"; It is therefore considered and adjudged by the Court that you, John Coleman, alias Johnny Coleman, alias Big Time Coleman, are guilty of the offense of murder in the first degree as charged in the indictment and that the State of Alabama for the use of Greene County have and recover of you the costs of this prosecution and that you, John Coleman, alias Johnny Coleman, alias Big Time Coleman suffer death by electrocution at any hour on the 6th day of July, 1962, inside the walls of Kilby Prison at Montgomery, Alabama, in a room arranged for the purpose of electrocuting convicts sentenced to death by electrocution. It is therefore ordered and adjudged by the Court that the Warden of Kilby Prison at Montgomery, or in case of his death, disability or absence his deputy shall at any hour on the 6th day of July, 1962, inside the walls of Kilby Prison at Montgomery in a room arranged for the purpose of electrocuting convicts sentenced to death by electrocution, cause to pass through the body of the said John Coleman, alias Johnny Coleman, alias Big Time Coleman, a current of electricity of sufficient intensity to cause his death, and the continuance and application of such current throughout the body of the said John Coleman, alias Johnny Coleman, alias Big Time Coleman, until the said John Coleman, alias Johnny Coleman, alias Big Time Coleman be dead.

And it is further ordered and adjudged by the Court that the Clerk of the Court shall within ten days from this day, the day of April 4th, 1962, issue a warrant under the

seal of this Court for the execution of the sentence in this case which shall recite the fact of conviction, setting forth specially the offense, the judgment of the Court, the time fixed for the execution of the sentence in this case, directed to the Warden of Kilby Prison at Montgomery, Alabama commanding him to proceed at the time and place named in the sentence to carry the same into execution, by causing to pass through the body of the said John Coleman, alias Johnny Coleman, alias Big Time Coleman a current of electricity of sufficient intensity to cause death and the application and continuance of such current through the body of the said John Coleman, alias Johnny Coleman, alias Big Time Coleman until said John Coleman, alias Johnny Coleman, alias Big Time Coleman is dead and the Clerk of this Court shall deliver such [fol. 32] warrant to the Sheriff of Greene County, Alabama, to be by the said Sheriff delivered to the said Warden together with the said John Coleman, alias Johnny Coleman, alias Big Time Coleman.

And it is further ordered and adjudged by the Court that immediately upon receipt of said warrant the Sheriff shall transport the said John Coleman, alias Johnny Coleman, alias Big Time Coleman to Kilby Prison at Montgomery, Alabama and shall there deliver the said John Coleman, alias Johnny Coleman, alias Big Time Coleman and the warrant aforesaid into the hands of the Warden and shall take from the Warden his receipt for said John Coleman, alias Johnny Coleman, alias Big Time Coleman and said warrant, which said receipt the Sheriff shall return to the office of this Court.

And thereupon in open Court on this day at the time of the sentence the defendant gave notice of appeal and moved the Court to suspend the execution of the sentence in this case pending appeal. It is therefore ordered and adjudged by the Court that the execution of the sentence in this case be and the same is hereby suspended pending appeal.

And it is further ordered and adjudged by the Court that the Sheriff of Greene County, Alabama, be and he is

hereby ordered to immediately transport the said John Coleman, alias Johnny Coleman, alias Big Time Coleman to Kilby Prison at Montgomery, Alabama, there to be held pending appeal in this case.

Given under my hand this 4th day of April, 1962.

/s/ E. F. HILDRETH
Judge of the 17th Judicial
Circuit of Alabama

[fol. 33]

IN THE SUPREME COURT OF ALABAMA

* * * *

[Title Omitted]

ARGUMENT AND SUBMISSION OF CAUSE—March 19, 1963

Come the parties by attorneys and argue and submit this cause for decision.

[fol. 34]

* * * *

IN THE SUPREME COURT OF ALABAMA

* * * *

JOHN COLEMAN, ALIAS, ETC.

v.

STATE OF ALABAMA

Appealed from Greene Circuit Court

OPINION—May 9, 1963

SIMPSON, JUSTICE.

John "Big Time" Coleman, a Negro, was indicted, tried and convicted of murder in the first degree of one John D. [fol. 35] "Screwdriver" Johnson, a white mechanic, and his punishment was affixed at death. The appeal is taken pursuant to the automatic appeal statutes, §§ 382 (1), et seq., Title 15, Code of Ala. 1940.

"Screwdriver" Johnson was killed on Wednesday, August 30, 1961, while returning to his home in Eutaw, Alabama about 9:15 in the evening. The cause of death was a shotgun wound on the left side of the chest entering the heart. The apparent motive was robbery, as a billfold which Johnson habitually carried was not found on the body; only the leather strap was attached to his belt. The decedent's body was found in the street in front of his home by a passerby in an automobile. A screwdriver was found in decedent's hand, with which he probably tried to defend himself. There were four shots fired, two hitting the deceased. Number five shot were removed from the body and a nearby building. Four shotgun shells, 12 gauge Red Western Super X brand, number five shot were found in decedent's back yard and were sent to the State Toxicologist.

Some ten unfired shotgun shells of the same brand and type as the other four were found underneath an abandoned building across the street from the decedent's

house, along with a piece of minnow seine which the State contended appellant had used to mask his face. Another piece of seine was found on a barbed wire fence to the [fol. 36] rear of decedent's house. These were all sent to the Toxicologist for examination. About the piece of minnow seine found underneath the abandoned house were men's footprints made by a person wearing a narrow pointed shoe. Appellant wore this type shoe at the trial.

Banks & Company, a retail store in Eutaw, had been burglarized on the day before the killing. On the preceding Saturday appellant had escaped jail in Eutaw. There was testimony that a Negro about the size of appellant was seen behind the building and other testimony that appellant was seen in front of the building the night of the burglary. Among the items missing from the store was a 12 gauge Browning automatic shotgun, 30 inch barrell, full choke, standard grade, and shotgun shells of the same brand and type as were found near decedent's home. Certain items of clothing were found missing, including a shirt and sport coats. A button was found near the rear window of the store, which had apparently been pulled from the clothing worn by the burglar in entering the window. The button was sent to the State Toxicologist for examination.

Prior to August, 1961, appellant had on two or three different occasions worked for the proprietor of a minnow pond located on the Tuscaloosa Highway. On or [fol. 37] about August 30, 1961, a small building near the pond was entered and a piece of net was cut from one of the minnow seines. It was later determined that two pieces, the one found underneath the building and the other found on the barbed wire fence, perfectly matched the larger piece. A loud sport shirt with the second button missing was found near the pond. Also found was a collar board, the type used to hold new shirts, and a tag used to mark and identify the size of new pants.

The shirt with the missing button, found near the pond, was one of two, of medium size sold by Banks & Company during the year and nowhere within a one hundred mile radium of Eutaw were such shirts sold by any other. Two witnesses testified that they had seen appellant wear-

ing a shirt of this type during the summer. The shirt, of very striking colors, was apparently bought by appellant along with a pair of khaki pants from Banks & Company and were charged to someone for whom appellant had worked. The charge ticket for these two items was entered into evidence.

Another shirt and two sport coats of the type stolen from Banks & Company were found in appellant's possession when he was arrested in Cleveland, Ohio. Appellant claimed he had paid cash at Banks & Company for the items, but none of the sales personnel remembered such a transaction with appellant. Also found in his suitcase was a pair of khaki pants. All of this clothing [fol. 38] was sent to the State Toxicologist.

Appellant when asked where he procured the money for travel to Cleveland, stated that he had won most of it in a crap game with two other Negroes. These persons, however, testified that at no time during August, 1961 had they given appellant any money, nor had he won any money from them in a crap game.

Certain checks, which the decedent or his wife had cashed for appellant were entered into evidence, being identified by the cashier of the local bank.

Dr. Nelson Grubbs, State Toxicologist, who aided in the investigation of this case is to be commended for his able scientific preparation of the evidence for presentation at trial. His testimony seems to tie up the vast web of circumstantial evidence, which if believed by the jury, would point, without doubt, to the guilt of appellant.

Dr. Grubbs testified that he examined the four shotgun shells which had been fired, and in his opinion, based on test firings of shotguns in his laboratory, the shells had been fired from a new Browning automatic shotgun, standard grade. The shot, which were removed from decedent's body, were also examined and determined to be number five Western Super X shot.

[fol. 39] The pieces of minnow seine were determined by Dr. Grubbs to have been cut from a larger piece discovered at the minnow pond. The missing button was determined to have been pulled from the shirt found at the

pond; the fibres under the button were the same as the fibres of the shirt and the thread size was identical.

In the pocket of this shirt were found light and dark blue fibres, wood chips, some of which contained a green stain (determined to be coppertox), and an eyelash with purple mascara, nylon fibres of the same type as the seine, and some traces of carnauba wax of the type used for coating shotgun shells. The unfired shells were examined and found thereon were light and dark blue fibres, wood chips with the green coppertox stain, purple mascara, and also the nylon fibres of the same type as the seine. in the opinion of Dr. Grubbs, the shells had at one time been contained in the pocket of the shirt. The shirt, which evidently was purchased from Bank & Company by appellant, was apparently the same shirt which witnesses had testified they saw appellant wear. As stated, it was in evidence that the shirt was very "loud" and that there had been only two of the same size within a one-hundred-mile radius.

Dr. Grubbs further testified that upon examination of a sport coat of the same type as that stolen from Banks [fol. 40] & Company, and found in appellant's possession in Cleveland, he found in the pocket; eyelashes with purple mascara, wood chips with coppertox, and that these items were chemically identical to those same items found in the shirt pocket and on the shotgun shells. The wood chips were evenly cut and appeared to have been produced by cutting wood with a high speed tool.

Dr. Grubbs determined the khaki pants found in appellant's suitcase in Cleveland to be of the type khaki normally used as work pants, and that the tag found at the minnow pond perfectly matched the stitching on the pants, being unevenly sewn and in his opinion had been sewn thereon at one time. He further testified that the pants had been wet at some time, but due to the absence of scrub marks had probably never been washed. It was in evidence that it was foggy or raining the night decedent was killed.

The collar board found at the minnow pond was determined by Dr. Grubbs to be of the identical cut as that on shirts of the same brand sold by Banks & Company. The saw marks on the cardboard were exactly the same.

The only defense, other than the general denial of the State's allegations, is what purported to be an alibi. Testifying in his own behalf, appellant stated that he had visited with his mother in Birmingham, Alabama on a [fol. 41] Monday in the latter part of August, 1961, but that he did not remember the exact date; that he traveled on to Cleveland to see his wife, arriving there on a Thursday. Both appellant's mother and his stepfather testified that he had visited with them on a Monday, but they did not remember the date, but that it was in the latter part of August. The deceased was killed on a Wednesday.

Appellant devotes most of his argument on appeal, having raised the point by a motion for a new trial, that the practice of the Greene County Jury Commission in selecting grand and petit jurors resulted in the arbitrary and systematic exclusion of Negroes on racial grounds and is contrary to the equal protection clause of the 14th Amendment. Appellant's attorney was given an opportunity on the hearing of the motion for a new trial to adduce evidence of any systematic exclusion but none was introduced other than an affidavit of appellant's mother that her son was indicted by a grand jury composed of white men, and tried and convicted by a petit jury composed of twelve white men. She further deposed that she was *informed* after the trial and conviction that there was systematic exclusion of qualified Negroes from jury duty in Greene County. There was no evidence in the record of the population of the two races, nor of the ratio of properly qualified Negroes as compared to properly qualified [fol. 42] whites. The transcript is completely devoid of any proof whatsoever tending to support appellant's allegation. The affidavit sworn out by appellant's mother does not supply this proof. It was even shown at the trial that she was not a resident of Greene County, but that she lived in Jefferson County, Alabama.

The burden of proof was upon the defendant to establish the alleged racial discrimination on the ground that his rights under the 14th Amendment of the Federal Constitution were violated in that persons of his race were systematically and intentionally excluded from the jury roll and the jury box from which the grand and petit

juries were drawn.—*Washington* v. *State*, 269 Ala. 146, 112 So. 2d 179.

No sufficient proof having been produced at the hearing on the motion for a new trial, or at any other state of the proceedings, it is clear appellant may not now complain. Therefore, we are left under no doubt that appellant's point on systematic exclusion of Negroes from the jury rolls in Greene County is not well taken.

There was some suggestion on appeal that trial counsel appointed by the lower court was inadequate to fully assert appellant's constitutional rights in view of the fact that he was a white man, and appellant was a Negro. With this we cannot agree. There is nothing in the record [fol. 43] to indicate any inadequacy or incompetence on the part of appellant's trial counsel. We have consistently said that wide discretion must be allowed counsel in the conduct of the trial of his case and the evidence must be clear and convincing before we would ascribe to him improper motives.—*Clark* v. *State*, 239 Ala. 380, 195 So. 260.

Appellant's only other argument is that the verdict of murder in the first degree with punishment affixed at death should not be predicated upon circumstantial evidence alone. This is clearly not the rule in Alabama (*Hall* v. *State*, 40 Ala. 698), so long as the circumstantial evidence is such as to produce a conviction of guilt upon the jury's mind, beyond a reasonable doubt. The rule is settled that the corpus delicti may be established by circumstantial evidence and need not be proved by direct or positive testimony.—*Brooks* v. *State*, 248 Ala. 628, 29 So. 2d 4. Section 314, Title 14, Code of Ala. 1940, provides, inter alia:

> "Every homicide * * * committed in the perpetration of, or the attempt to perpetrate, any * * * robbery * * * is murder in the first degree * * *."

If the evidence presented by the State was believed by the jury, it was within the province of the jury to believe that appellant shot and killed the deceased while engaged [fol. 44] in the perpetration of the crime of robbery.

We have held on numerous occasions that a homicide of a type falling within § 314 is murder in the first de-

gree, giving effect to the statute. The turpitude of the crime combined with the fatal result raise the degree of the crime to murder in the first degree.—*Mitchell* v. *State*, 60 Ala. 26. As for the punishment for the crime, that is properly left to the discretion of the jury, within the statutory bounds. Despite any feelings of sympathy we might entertain on appellant's behalf we must allow the jury's pronouncement to stand.

It is our duty where an appeal is prosecuted under the automatic appeal statute to examine all the evidence for reversible error without the necessity of seasonable objection. But upon a finding of no reversible error in the record we will affirm.—Section 382 (10), Title 15, Code of Ala. 1940, and annotations.

We have carefully examined the entire record and are clear to the conclusion that no reversible error is made to appear.

AFFIRMED.

All the Justices concur.

[fol. 45]

* * * *

IN THE SUPREME COURT OF ALABAMA

* * * *

JOHN COLEMAN, alias JOHNNY COLEMAN, alias BIG TIME COLEMAN

vs.

STATE OF ALABAMA

* * * *

JUDGMENT—May 9, 1963

Come the parties by attorneys, and the record and matters therein assigned for errors, being argued and submitted and duly examined and understood by the Court, it is considered that in the record and proceedings of the Circuit Court there is no error.

IT IS THEREFORE CONSIDERED, ORDERED AND ADJUDGED that the judgment of conviction and sentence of the Circuit Court be and is hereby in all things affirmed.

IT IS NOW ORDERED that Friday, July 12, 1963, be and is hereby fixed as the date for the execution of the defendant.

IT IS FURTHER ORDERED that the Sheriff of Greene County, Alabama, deliver the defendant to the Warden of Kilby Prison in Montgomery, Alabama, and that said Warden execute the judgment and sentence of the law on Friday, July 12, 1963, by causing a current [fol. 46] of electricity of sufficient intensity to cause death to pass through the body of the said John Coleman, alias Johnny Coleman, alias Big Time Coleman, until he is dead, and in so doing he will follow the rules prescribed by the statutes.

It is also CONSIDERED, ORDERED AND ADJUDGED that the appellant, John Coleman, alias, pay the costs of appeal of this Court and of the Circuit Court, for which costs let execution issue.

* * * *

[fol. 47]

* * * *

IN THE SUPREME COURT OF ALABAMA

[Title Omitted]

[File Endorsement Omitted]

APPLICATION FOR REHEARING—Filed May 22, 1963

Now comes Petitioner, in the above styled cause, and respectfully moves this Honorable Court to grant to him a Rehearing in said cause, and reverse, revise and hold for naught its Judgment rendered on to-wit, the 9th day of May, 1963, affirming the decision of the Circuit Court of Greene County, Alabama, wherein after a trial by a jury, the defendant was found guilty of murder in the first degree and sentenced to death by electrocution.

Appellant further moves this Court to grant a Stay of Execution in this cause, during the pendency of this Application for a Rehearing.

Submitted herewith is a Brief and Argument, in support of said Motion.

./s/ Orzell Billingsley, Jr.
ORZELL BILLINGSLEY, JR.
1630 Fourth Avenue, North
Birmingham, Alabama
ATTORNEY FOR APPELLANT

[fol. 48]

* * * * *

IN THE SUPREME COURT OF ALABAMA

* * * * *

[Title Omitted]

ORDER OVERRULING APPLICATION FOR REHEARING—
June 20, 1963

IT IS ORDERED that the application for rehearing filed on May 22, 1963, be and the same is hereby overruled.

[fol. 49]

SUPREME COURT OF THE UNITED STATES

No. 617 Misc., October Term, 1963

JOHN COLEMAN, PETITIONER

vs.

ALABAMA

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND PETITION FOR WRIT OF CERTIORARI—October 28, 1963

On petition for writ of Certiorari to the Supreme Court of the State of Alabama.

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 583 and placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

October 28, 1963

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 583

JOHN COLEMAN,

Petitioner,

—v.—

ALABAMA.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

BRIEF FOR PETITIONER

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INDEX

	PAGE
Opinion Below	1
Jurisdiction	1
Constitutional and Statutory Provisions Involved	2
Question Presented	2
Statement	3
ARGUMENT	8
Petitioner Was Denied Rights Under the Due Process and Equal Protection Clauses of the Fourteenth Amendment When Denied an Opportunity to Introduce Evidence Establishing Systematic Exclusion of Negroes From the Grand and Petit Juries	8
CONCLUSION	13

TABLE OF CASES:

Arrington v. State, 253 Ala. 178, 43 So. 2d 644	12
Ball v. State, 252 Ala. 686, 42 So. 2d 626, cert. den. 339 U. S. 929	9
Baltimore & O. R. Co. v. United States, 298 U. S. 349	11
Carter v. Texas, 177 U. S. 442	11
Clark v. State, 239 Ala. 380, 195 So. 260, cert. den. 311 U. S. 688	12
Cole v. Arkansas, 333 U. S. 196	11
Lombard v. Louisiana, 373 U. S. 255	11

PAGE

Manhattan Life Ins. Co. v. Cohen, 234 U. S. 123 13
Michel v. Louisiana, 350 U. S. 91 12

Napue v. Illinois, 360 U. S. 264 8
Niemotko v. Maryland, 340 U. S. 268 8

Raley v. Ohio, 360 U. S. 423 13
Re Oliver, 333 U. S. 257 11

United States ex rel. Goldsby v. Harpole, 263 F. 2d 71 (5th Cir. 1959) 9, 12
United States ex rel. Seals v. Wiman, 304 F. 2d 53 (5th Cir. 1962) 9, 12

Whitney v. California, 274 U. S. 357 13

STATUTES:

Code of Alabama, Tit. 14, §318 (1958) 3

Code of Alabama, Tit. 15, §§278, 279 (1958) 9

Code of Alabama, Tit. 15, §§382(1)-(13) (1958) 2, 6

Code of Alabama, Tit. 30, §21 (1958) 5

OTHER AUTHORITIES:

17th Decennial Census, Final Report, P. C.(1) 2B, Alabama, p. 81 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 583

JOHN COLEMAN,

Petitioner,

—v.—

ALABAMA.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

BRIEF FOR PETITIONER

Opinion Below

The opinion of the Supreme Court of Alabama is not yet reported and may be found in the printed record, pp. 28-34.

Jurisdiction

The judgment of the Supreme Court of Alabama affirming judgment of conviction and sentence to death was entered May 9, 1963 (R. 35) and application for rehearing was denied June 20, 1963 (R. 37). Petition for writ of certiorari was filed in this Court September 17, 1963 and granted October 28, 1963 (R. 38).

Constitutional and Statutory Provisions Involved

1. This case involves Section 1 of the Fourteenth Amendment to the Constitution of the United States.

2. This case involves Code of Alabama, Title 15, §382(10) (1958):

> *Hearing and determination in appellate court.*
>
> In all cases of automatic appeals the appellate court may consider, at its discretion, any testimony that was seriously prejudicial to the rights of the appellant, and may reverse thereon even though no lawful objection or exception was made thereto. The appellate court shall consider all of the testimony and if upon such consideration is of opinion the verdict is so decidedly contrary to the great weight of the evidence as to be wrong and unjust and that upon that ground a new trial should be had, the court shall enter an order of reversal of the judgment and grant a new trial, though no motion to that effect was presented in the court below.

Question Presented

Whether petitioner, a Negro under sentence of death, was denied rights under the due process and equal protection clauses of the Fourteenth Amendment when:

(1) the trial court refused to permit introduction of proof establishing systematic exclusion of Negroes from grand and petit juries on the ground that petitioner had waived his constitutional rights by failure to raise them prior to arraignment and trial; and

(2) the Supreme Court of Alabama ignored this alleged waiver and affirmed on the ground that petitioner was given opportunity to introduce proof of systematic exclusion and did not introduce sufficient proof?

Statement

Petitioner, a Negro, was indicted, tried, and convicted[1] of the murder of a white man by juries of Greene County, Alabama, and sentenced to death[2] (R. 1-3).

Because of indigence, petitioner was represented by court appointed counsel, Thomas F. Seale, a member of the white race, at arraignment and trial (R. 1, 3, 5, 33). Subsequent to conviction, Seale was appointed to prosecute an appeal to the Supreme Court of Alabama (R. 7). At no time did Mr. Seale make any attempt to assert petitioner's constitutional right to grand and petit juries chosen without systematic exclusion of the members of the Negro race (R. 18).

---

[1] The facts with respect to the killing and petitioner's connection with it are summarized in the opinion of the Supreme Court of Alabama (R. 28-31). Conviction and sentence rested on circumstantial evidence alone. The deceased, a screw driver clutched in his hand, was found dead of a shotgun wound. There were no witnesses to the shooting. The gun which caused death was never found. The prosecution sought to link petitioner to a burglary where shotgun and shells of the same brand as those causing death were stolen. Clothing in petitioner's possession was the same type as that taken from the burglarized store. A piece of minnow net found near decedent's house matched a larger piece found on a farm where petitioner had worked, and a shirt, claimed to belong to petitioner, contained particles similar to those found on unused shotgun shells at the scene of the killing. The shirt also lacked a button which, according to the State Toxicologist, was the same as a button found at the scene of the burglary. Petitioner denied ownership of the shirt and claimed he was traveling to Cleveland, Ohio, to visit his wife at the time the killing occurred.

[2] The jury imposed the death penalty. See R. 24 and Code of Alabama, Tit. 14 §318 (1958).

Subsequent to conviction and sentence, a Negro attorney entered the case in petitioner's behalf. He filed timely motion for new trial urging, for the first time, that Negroes had been systematically excluded from the grand and petit juries in violation of the Fourteenth Amendment to the Constitution of the United States (R. 9-11), and later filed an amendment to the motion for new trial, alleging that a new trial should be granted because of "newly discovered evidence" as shown by an attached affidavit of petitioner's mother (R. 12). This affidavit stated that petitioner was indicted by a grand jury composed of eighteen white men and tried by a petit jury composed of twelve white men and that affiant "was informed" after her son's conviction that "no Negroes, or only a mere token, have been summoned for jury duty in Greene County, Alabama, in spite of population ratio of the two races in modern times." The amendment asked the court to take notice of the motion for new trial and "after consideration of the evidence and proof which the defendant offers to make, grant said motion" (R. 12).

The trial court considered the motion for new trial and amendment at a hearing held June 1, 1963 (R. 15-23). At the outset, the state moved to strike the amendment, including the affidavit, on the ground, *inter alia,* that the amended motion was not germane to the original motion for new trial, there being nothing "about any newly discovered evidence" in the original motion for new trial (R. 16). The trial court granted the motion (R. 17) despite the fact that the "newly discovered evidence" pertained to systematic exclusion from the juries, an issue raised by the original motion for new trial (R. 9-11).

The court then considered the motion for new trial. Petitioner's counsel sought to introduce evidence that Negroes were systematically excluded from the grand jury which

indicted and the petit jury which tried, convicted, and sentenced, by attempting to call as witnesses the two Circuit Solicitors who had served as prosecuting attorneys at petitioner's trial (R. 17). But the state took the position that objections to the grand and petit juries based on exclusion of Negroes "cannot be raised for the first time on motion for new trial" (R. 18). At this point, petitioner's counsel asked to be permitted "to make an offer of what I intend to show" (R. 17), but the court refused, stating it would only hear argument on the law (R. 19).

The court indicated, however, that petitioner's counsel might place the two Circuit Solicitors on the stand and propound questions to them "and if an objection is raised, then the Court will rule upon it" (R. 19). Thomas H. Boggs, Solicitor of the 17th Judicial Circuit of the State of Alabama, which includes Greene County, was called (R. 20). He was permitted to testify that he had been present at every grand jury held in the county for the last 17 years and that he had a wide acquaintance among whites and Negroes in the County (R. 20, 21). However, when he was asked whether the ratio of Negroes to whites in Greene County was four to one,[3] the trial court sustained an objection on the ground that "you cannot go into those matters unless they have been raised properly during the trial or in some proceedings prior thereto" (R. 22). Once the trial court expressed this opinion, counsel sought only "to get one or two of these questions in the record for the purpose of taking an exception" (R. 22). Mr. Boggs was not permitted to answer additional questions seeking to establish systematic exclusion

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[3] According to the 17th Decennial Census, Final Report, P. C. (1) 2B, Alabama, p. 81, Greene County has a total population of 13,600, of whom 2,546 persons are white and 11,504 are non-white. There are 775 white males and 2,247 non-white males (the total 21 years of age and over) eligible for jury service. Code of Alabama, Tit. 30, §21 (1958).

on the same ground that the issue should have been raised prior to indictment and trial and could not be considered when raised by motion for new trial (R. 22-23).[4] The motion for new trial was denied (R. 23).

Petitioner appealed directly from judgment of conviction and sentence of death to the Supreme Court of Alabama pursuant to the Alabama automatic appeal statute, Code of Alabama, Tit. 15, §§382(1)-(13) (1958), which provides for

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[4] Attorney for Defendant: I can ask whether or not the law was complied with?

Court: Yes. The fact that the law was complied with; that is a general question, but the Court will sustain an objection to that because the courts have held repeatedly, the Supreme Court of Alabama and the Supreme Court of the United States, that you can not go into those matters unless they have been raised properly during the trial or in some proceedings prior thereto. That is the reason I asked you the question before. The case was tried by Mr. Boggs and the Court is familiar with it.

Attorney for Defendant: But I would like to get one or two of these questions in the record for the purpose of taking an exception to it.

Court: You may ask the questions, but the Court will have to sustain an objection to them.

Q. Mr. Boggs, you were present when the Grand Jury, which indicted Johnny Coleman, was convened, were you not?

A. I was.

Q. How many persons were on that grand jury?

A. Eighteen.

Q. Were any negroes on that grand jury?

Solicitor: I object to that, may it please the Court. It is an illegal mode of raising that which should have been raised by motion to quash the indictment.

Court: Sustain the objection.

Attorney for Defendant: I want to ask one more question, and then I won't have any further question to ask—two more, your Honor.

Q. Were there any negroes on the petit jury that tried this defendant?

Solicitor: I object to that, may it please the Court, on the ground that it should have been properly raised by motion to quash the venire if the Fourteenth Amendment was to be taken advantage of in this matter.

Court: Sustain the objection.

direct appeal from the trial court in capital cases (R. 28). The Supreme Court of Alabama has a "duty" where such an appeal is taken "to examine all the evidence for reversible error without the necessity of seasonable objection" (R. 34).

The Supreme Court, in affirming, did not discuss whether the failure of petitioner's court appointed counsel to object to exclusion of Negroes from the juries, prior to arraignment and trial, acted as a waiver of petitioner's constitutional rights although the court found generally "nothing in the record to indicate inadequacy or incompetence" on the part of counsel (R. 33). The manner in which the court disposed of the appeal, however, completely put to one side the question of alleged waiver, for, after determining that petitioner "was given an opportunity on the hearing of the motion for a new trial to adduce evidence of any systematic exclusion" (R. 32), the court held there was "no sufficient proof" to establish systematic exclusion of Negroes from grand and petit juries (R. 32, 33). The Supreme Court stressed that "the burden of proof was upon the defendant to establish the alleged racial discrimination," and found, "There was no evidence in the record of the population of the two races nor of the ratio of properly qualified Negroes as compared to properly qualified whites. The transcript is completely devoid of any proof whatsoever tending to support appellant's allegation" (R. 32, 33).

The Supreme Court of Alabama denied application for rehearing June 20, 1963 (R. 37).

ARGUMENT

Petitioner Was Denied Rights Under the Due Process and Equal Protection Clauses of the Fourteenth Amendment When Denied an Opportunity to Introduce Evidence Establishing Systematic Exclusion of Negroes From the Grand and Petit Juries.

This Court has a duty to determine independently facts or constructions upon which federal constitutional issues rest, see e.g., *Napue* v. *Illinois,* 360 U. S. 264, 272. "In cases in which there is a claim of denial of rights under the Federal Constitution, this Court is not bound by the conclusions of lower courts, but will re-examine the evidentiary basis on which those conclusions are founded," *Niemotko* v. *Maryland,* 340 U. S. 268, 271.

The Supreme Court of Alabama found petitioner "was given an opportunity at the hearing on motion for new trial to adduce evidence of any systematic exclusion" (R. 32) from the grand jury which indicted and petit jury which tried him. Reasoning from this premise, the court affirmed petitioner's conviction and sentence to death on the ground that he had not introduced sufficient proof of systematic exclusion of Negroes to meet the burden of proof imposed upon him to establish his Fourteenth Amendment claim (R. 32, 33).

Far from establishing, however, that petitioner was accorded an opportunity to present proof of systematic exclusion, the record shows clearly that persistent attempts to develop such evidence were thwarted repeatedly by rulings of the trial judge.

Subsequent to conviction, a Negro attorney entered the case for petitioner, and moved for a new trial on the ground,

inter alia, that Negroes were systematically excluded from the grand and petit juries (R. 10, 11).[5] At the outset of the hearing held on the motion for new trial, the court struck an amendment to the motion for new trial which incorporated an affidavit of petitioner's mother stating that her son was indicted by an all-white grand jury and tried by an all-white petit jury from which Negroes were systematically and intentionally excluded (R. 13). This affidavit was struck apparently on the ground that it was not "germane to the original motion" for new trial (R. 16), a conclusion unsupported by the record as both the affidavit and the motion for new trial claimed systematic exclusion of Negroes from juries (R. 10, 11, 13).

At this point, petitioner's counsel sought to call as witnesses the two Circuit Solicitors who had served as prosecuting attorneys at petitioner's trial (R. 17). The State objected on the ground that systematic exclusion cannot "be raised for the first time on motion for new trial," relying on *Ball v. State*, 252 Ala. 686, 42 So. 2d 626, a Supreme Court of Alabama decision announcing such a rule (R. 18).[6] Petitioner's counsel asked if he could "make an offer of what I intend to show" (R. 19), but the court indicated the proper procedure would be to have "Mr. Boggs and Mr.

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[5] The failure of petitioner's white court appointed counsel to raise the jury discrimination issue corroborates the conclusion of the United States Court of Appeals for the Fifth Circuit that white lawyers in the south "rarely, almost to the point of never, raise the issue of systematic exclusion." *United States ex rel. Goldsby* v. *Harpole*, 263 F. 2d 71, 81 (5th Cir. 1959); *United States ex rel. Seals* v. *Wiman*, 304 F. 2d 53, 68 (5th Cir. 1962).

[6] Alabama law requires objections to systematic exclusion of Negroes from the grand jury be raised by plea in abatement before defendant enters a plea to the merits and objections to the petit jury venire be raised before entering upon trial. Failure to object at proper times acts as a waiver. *Ball* v. *State*, 252 Ala. 686, 42 So. 2d 626, cert. den. 339 U. S. 929; Code of Ala., Tit. 15, §§ 278, 279 (1958).

Banks sworn and placed upon the stand and you may propound the questions to them if you care to do so; and if an objection is raised, then the Court will rule upon it" (R. 19).

Petitioner's counsel called Solicitor Thomas H. Boggs as a witness. He was permitted to testify that he was always present when the Greene County grand jury was convened, and that he had a wide acquaintance among both Negroes and whites in the county. When asked about the population ratio between Negroes and whites in the county, he stated that there were many more Negroes than whites. But when he was asked, "Whether in your best judgment you think it would be four to one?" (R. 21), objection was sustained for the reason "that you cannot go into those matters unless they have been raised properly" (R. 22). After this ruling, petitioner's counsel attempted only "to get one or two of these questions in the record for the purpose of taking an exception" (R. 22). The trial court again sustained objections on the ground that the jury issue was not properly raised on motion for new trial (R. 22, 23).

Totally unsupported, then, is the finding of the Supreme Court of Alabama that petitioner "was given an opportunity on the hearing of the motion for new trial to adduce evidence of any systematic exclusion" (R. 32). The trial judge, at the urging of the attorney for state, ruled that "you can not go into those matters unless they have been raised properly during the trial or in some proceedings prior thereto" (R. 22), and he sustained objections to questions which sought to establish the population ratio of the races in Greene County (R. 21) and the absence of Negroes from grand jury and petit jury (R. 22). The failure of the trial court to permit petitioner to establish the population ratio between the races in Greene County is especially significant, for the Supreme Court of Alabama affirmed, in part, on the

ground that there was no evidence of population ratio (R. 32).

As petitioner was denied an opportunity to develop evidence of violation of his constitutional rights, his conviction cannot be affirmed on the ground that he has not introduced "sufficient proof" to meet his "burden of proof" (R. 32, 33), for such a result would make a mockery of the constitutional right to equal protection of the laws which he claimed. *Carter* v. *Texas*, 177 U. S. 442.[7]

The hearing accorded petitioner did not meet the standards of the due process clause. Such a hearing "includes the right to introduce evidence and have judicial findings based upon it." *Baltimore & O. R. Co.* v. *United States*, and cases cited, 298 U. S. 349, 368, 369, 369n.28, 29; *Re Oliver* and cases cited, 333 U. S. 257, 273, 273n.31, 275; cf. *Lombard* v. *Louisiana*, 373 U. S. at 255 (Justice Harlan dissenting). Nor is due process satisfied when an appellate court considers such evidence of systematic exclusion as may be in a record if petitioner has had no opportunity to make a full presentation of proof. *Cole* v. *Arkansas*, 333 U. S. 196.[8]

The State of Alabama, in its Brief in Opposition to Certiorari, argued as if petitioner were seeking to invali-

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[7] In the *Carter* case, this Court reversed the judgment of a state court which held that a Negro claiming systematic exclusion from the grand jury had not "presented to the court . . . any evidence whatever in support of it," 177 U. S. at 446, on the ground that the defendant "offered to introduce witnesses to prove the allegations . . . and the court . . . declined to hear any evidence upon the subject." 177 U. S. at 448, 449.

[8] This is especially true in light of the Supreme Court of Alabama's refusal to consider all of the evidence available. In his brief petitioner asked the Supreme Court to take judicial notice of U. S. Census population figures for Greene County (see note 3, *supra*) but the Court refused, holding that there was no evidence of population figures.

date the Alabama rules of law which require that objection to formation of the grand jury be made prior to entering a plea to the indictment and that objection to the petit jury venire be made before trial, or else that such objections are considered waived.[9] Petitioner, however, has not attacked the reasonableness of these procedural requirements for the reason that the Supreme Court of Alabama did not choose to rest its affirmance on the ground of waiver, but, as it has done in similar cases in the past, *Clark* v. *State*, 239 Ala. 380, 195 So. 260, cert. denied 311 U. S. 688,[10] clearly and unmistakably rested its decision on the ground that petitioner did not introduce sufficient proof of systematic exclusion (R. 32, 33).[11]

The opinion of the Supreme Court suggests that the court chose to ignore the failure to raise the question of systematic exclusion because the case came to that court under the automatic appeal statute, cf. *Arrington* v. *State*, 253 Ala. 178, 182, 43 So. 2d 644, 648, where the duty of the court is "to examine all evidence for reversible error without the necessity of seasonable objection" (R. 34). But the reason that the Supreme Court of Alabama put the waiver rule to one side and decided the case as it did are

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[9] See note 6, *supra*.

[10] In *Clark* v. *State*, *supra*, the Supreme Court of Alabama found "without regard to the tardiness in presenting the question of the exclusion of qualified persons of the Negro race . . . we may say that the evidence offered in support of this contention by the defendant fails to show . . . [Negroes were] systematically or arbitrarily excluded." 239 Ala. 380, 386, 195 So. 260, 264.

[11] As the Supreme Court of Alabama did not treat the constitutional rights asserted as being waived but on the contrary ruled they were not established by evidence, petitioner has made no attempt to argue that a white, court appointed, lawyer in Alabama could not effectively waive such constitutional rights. See *United States ex rel. Goldsby* v. *Harpole*, 263 F. 2d 71, 81 (5th Cir. 1959); *United States ex rel. Seals* v. *Wiman*, 304 F. 2d 53, 68 (5th Cir. 1962). Cf. *Michel* v. *Louisiana*, 350 U. S. 91.

not relevant here. Where the highest court of a state holds a federal question is properly before it and then proceeds to consider and dispose of that issue, this Court is no longer concerned with whether a litigant has complied with the proper state procedures for raising the question. *Manhattan Life Ins. Co.* v. *Cohen,* 234 U. S. 123, 134; *Whitney* v. *California,* 274 U. S. 357, 360-1; *Raley* v. *Ohio,* 360 U. S. 423, 436.

Petitioner was denied an opportunity to introduce proof of systematic exclusion of Negroes from the grand and petit juries when absence of such proof served to affirm his conviction. In this, he has been denied basic procedural fairness, and rights he sought to assert have been unconstitutionally abridged.

CONCLUSION

Wherefore, for the foregoing reasons, petitioner prays this Court reverse the judgment of the court below.

Respectfully submitted,

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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1963

No. 583

JOHN COLEMAN,

Petitioner

Vs.

STATE OF ALABAMA,

Respondent

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

BRIEF FOR RESPONDENT

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INDEX

	Page
Question Presented	1
Argument	1
Conclusion	3
Certificate	4

TABLE OF CASES

Arrington v. State, 253 Ala. 178, 43 So.2d 644, cert. den. 339 U.S. 950, 70 S.Ct. 798, 94 L.ed. 1363 3

Baker v. State, 150 Fla. 446, 7 So.2d 792 3

Ball v. State, 252 Ala. 686, 42 So.2d 626 cert. den. 339 U.S. 929, 70 S.Ct. 625, 94 L.ed. 1350 3

Clark v. State, 239 Ala. 380, 195 So. 260 3

Francis v. Southern Pacific Co., 333 U.S. 445, 450, 92 L.ed. 798, 804, 68 S.Ct. 611 2

Johnson v. Williams, 244 Ala. 391, 13 So.2d 683 3

Maund v. State, 254 Ala. 452, 48 So.2d 553 3

United States, ex rel Goldsby v. Harpole, 263 F.2d 71 2

United States, ex rel Seals v. Wiman, 304 F.2d 53, cert. den. 372 U.S. 915, 83 S.Ct. 717, 9 L.ed.2d 722 2

Washington v. State, 95 Fla. 289, 116 So. 470, cert. den. 278 U.S. 599, 73 L.ed. 528, 49 S.Ct. 8 3

STATUTORY PROVISIONS

Title 15, Sections 278 and 279, Code of Alabama, as Recompiled 1958 3

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BRIEF FOR RESPONDENT

QUESTION PRESENTED

WHETHER, WHERE THERE IS NO EVIDENCE AS TO REASONS FOR NOT RAISING CONSTITUTIONAL QUESTIONS RELATIVE TO COMPOSITION OF THE GRAND JURY PRIOR TO ARRAIGNMENT OR OF THE PETIT JURY PRIOR TO ENTERING UPON THE TRIAL OF A CASE ON ITS MERITS, SUCH QUESTIONS MAY BE RAISED FOR THE FIRST TIME AFTER A VERDICT AND JUDGMENT OF GUILTY.

ARGUMENT

WHERE THERE IS NO EVIDENCE AS TO REASONS FOR NOT RAISING CONSTITUTIONAL QUESTIONS RELATIVE TO COMPOSITION OF THE GRAND JURY PRIOR TO ARRAIGNMENT OR OF THE PETIT JURY

PRIOR TO ENTERING UPON THE TRIAL OF A CASE ON ITS MERITS, SUCH QUESTIONS MAY NOT BE RAISED FOR THE FIRST TIME AFTER A VERDICT AND JUDGMENT OF GUILTY.

In his brief, the Petitioner recognizes the reasonableness of the procedural requirements that any objection to the formation of the grand jury must be made prior to entering a plea to the indictment and that any objections to the petit jury venire must be made before trial. Yet he takes the inconsistent position that he can go to trial without raising any objections as to the compositttion of such juries and later if he is dissatisfied with the verdict and judgment, he can raise such questions for the first time in a Motion for New Trial.

As was said by the Supreme Court of Alabama in *Vernon v. State*, 240 Ala. 577, 200 So. 560:

> ". . . no skilled lawyer would ever attempt to raise such question until after conviction. Why not take a chance on gaining an acquittal before raising the constitutional issue? To now hold that the question may be raised after the trial is over would be to make a mockery of all criminal prosecutions."

Neither in his Motion for New Trial, in his offer of proof relative thereto, nor in his brief does Petitioner make any claim that his Court-appointed white attorney negligently failed to raise the constitutional questions as in *United States ex rel Willie Seals, Jr. v. Wiman*, 5 Cir., 304 F.2d 53, cert. den. 372 U.S. 915, 83 S.Ct. 717, 9 L.ed.2d 722, or that his trial attorney had not effectively waived the question as in *United States ex rel Goldsby v. Harpole*, 263 F.2d 71.

As was said by this Court in *Francis v. Southern Pacific Co.*, 333 U.S. 445, 450, 92 L.ed. 798, 804, 68 S.Ct. 611, "it

[the Motion for New Trial] is an effort to retrieve a position that was forsaken when it was decided to take a gamble on the existing jury panel. In either case the objection comes too late." See *Baker v. State*, 150 Fla. 446, 7 So.2d 792; *Washington v. State*, 95 Fla. 289, 116 So. 470, cert. den. 278 U.S. 599, 73 L.ed. 528, 49 S.Ct. 8; *Clark v. State*, 239 Ala. 380, 195 So. 260; *Ball v. State*, 232 Ala. 686, 42 So.2d 626, cert. den. 339 U.S. 929, 70 S.Ct. 625, 94 L.ed 1350; *Arrington v. State*, 253 Ala. 178, 43 So.2d 644, cert. den. 339 U.S. 950, 70 S. Ct. 798, 94 L.ed. 1363, *Maund v. State*, 254 Ala. 452, 48 So.2d 553; *Johnson v. Williams*, 244 Ala. 391, 13 So.2d 683; Title 15, Sections 278 and 279, Code of Alabama, as Recompiled 1958.

If the contention made by Petitioner is upheld, it can only result in no end of confusion and chaos in the field of criminal law.

CONCLUSION

Wherefore, for the foregoing reasons, Respondent respectfully prays that the judgment of the Court below be affirmed.

Respectfully submitted,

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Attorneys for Respondent

CERTIFICATE OF SERVICE

I, Leslie Hall, one of the Attorneys for Respondent, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 22 day of February, 1964, I served the requisite number of copies of the foregoing Brief for Respondent upon Jack Greenberg and Michael Meltsner, 10 Columbus Circle, New York 19, New York, and upon Orzell Billingsley, Jr., 1630 Fourth Avenue, North, Suite 510-512, Birmingham, Alabama, Attorneys for Petitioner, by depositing the same in the United States mail, first class postage prepaid, and properly addressed to them at their respective addresses.

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